No. 14-510

In the Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ROBERT E. KIRSCHMAN, JR.
DONALD E. KINNER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a government contractor's erroneous predictions about pending litigation and its expectation that the government would deny its administrative claims constitute "extraordinary circumstances" that might warrant equitable tolling of the six-year limitations period in 41 U.S.C. 7103(a)(4) for presenting a contract claim to the government.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 12
Conclusion 20

TABLE OF AUTHORITIES

Cases:

American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 5

Arctic Slope Native Ass'n v. *Sebelius*:

583 F.3d 785 (Fed. Cir. 2009), cert. denied, 561 U.S. 1026, and 562 U.S. 835 (2010) 7

699 F.3d 1289 (Fed. Cir. 2012) 7, 8, 9, 12, 16, 17

Baldwin Cnty. Welcome Ctr. v. *Brown*, 466 U.S. 147 (1984) 13

Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 17

Cherokee Nation v. *Leavitt*, 543 U.S. 631 (2005) 4, 5, 13, 18

Cherokee Nation v. *United States*, 199 F.R.D. 357 (E.D. Okla. 2001) 4

Holland v. *Florida*, 560 U.S. 631 (2010) 6, 9, 13, 14, 15

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 14

Lawrence v. *Florida*, 549 U.S. 327 (2007) 14, 16, 17

Pace v. *DiGuglielmo*, 544 U.S. 408 (2005) 13, 14, 15, 16

Petrella v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) 14

Ramah Navajo Chapter v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) 8

Cases—Continued: Page

Ramah Navajo Chapter v. *Norton*, 250 F Supp. 2d 1303 (D.N.M. 2002) 9
Salazar v. *Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) 4, 13, 18
Wallace v. *Kato*, 549 U.S. 384 (2007) 14

Statutes, regulation and rule:

Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.* 2
41 U.S.C. 7103(a)(1) 2
41 U.S.C. 7103(a)(2) 2
41 U.S.C. 7103(a)(4) 3
41 U.S.C. 7103(g) 3
41 U.S.C. 7104(a) 3
41 U.S.C. 7104(b) 3
41 U.S.C. 7107(a)(1) 3
Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243:
§ 2531(a)(1), 108 Stat. 3322 3
§ 10001(b), 108 Stat. 3404 3
Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* 1
25 U.S.C. 450f(a) 2
25 U.S.C. 450j(c)(2) 2
25 U.S.C. 450j-1(a)(1) 2
25 U.S.C. 450j-1(a)(2) 2
25 U.S.C. 450j-1(b) 4
25 U.S.C. 450*l*(c) 2
25 U.S.C. 450m-1(a) 3
25 U.S.C. 450m-1(d) 2, 3
28 U.S.C. 1291 3
28 U.S.C. 1295(a)(3) 3

Statutes, regulation and rule—Continued: Page

41 U.S.C. 601 *et seq.* (2006) 2
41 U.S.C. 605(a) (2006) 2
48 C.F.R. 33.206(a) 3
Fed. R. Civ. P. 58(a) 7

In the Supreme Court of the United States

No. 14-510

MENOMINEE INDIAN TRIBE OF WISCONSIN,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 764 F.3d 51. The opinion of the district court (Pet. App. 20a-43a) is reported at 841 F. Supp. 2d 99.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The petition for a writ of certiorari was filed on November 3, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, directs the Secretary of the Interior or the Secretary of Health and Human Services, upon a formal request by

an Indian tribe, to enter into a "self-determination contract" with a tribal organization to permit that organization to administer certain federal programs, services, functions, and activities for Indians that would have otherwise been administered by the relevant Secretary. 25 U.S.C. 450f(a). The amount of funds paid by the government under such a contract must be no less than the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" during the fiscal year in question. 25 U.S.C. 450j-1(a)(1). ISDA further requires the government to pay an additional amount under the contract for reasonable "contract support costs" incurred for contract compliance and management. 25 U.S.C. 450j-1(a)(2). Because contract support costs may vary from year to year, the sums to be provided are negotiated on an annual basis and memorialized in an "annual funding agreement." See 25 U.S.C. 450j(c)(2); see also 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (f)(2)).

ISDA specifies that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*, "shall apply to self-determination contracts." 25 U.S.C. 450m-1(d).[1] The CDA requires that "[e]ach claim" by a contractor against the government relating to a contract "shall be submitted to the contracting officer [at the relevant agency] for a decision." 41 U.S.C. 7103(a)(1) and (2); see 41 U.S.C. 605(a) (2006) ("[a]ll claims"). The CDA claim "need not be detailed, and may consist of a short written statement outlining the basis of the claim, estimating damages, and requesting a final decision."

---

[1] This brief, like the court of appeals' opinion (see Pet. App. 3a n.1), primarily cites the current codification of the CDA rather than its prior codification at 41 U.S.C. 601 *et seq.* (2006).

Pet. App. 4a. In 1994, Congress amended the CDA to require that any such claim by a contractor "shall be submitted within 6 years after the accrual of the claim." Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2531(a)(1), 108 Stat. 3322 (41 U.S.C. 7103(a)(4)). That six-year limitations period applies to claims arising under contracts awarded on or after October 1, 1995. *Id.* § 10001(b), 108 Stat. 3404; 48 C.F.R. 33.206(a).

"The contracting officer's decision on a claim is final and conclusive and is not subject to review * * * , unless an appeal or action is timely commenced as authorized by [the CDA]." 41 U.S.C. 7103(g). With an exception not relevant here, the CDA provides a contractor aggrieved by a contracting officer's decision with two paths to review, both of which lead to the Federal Circuit. The contractor may bring an administrative appeal, or a contract action before the Court of Federal Claims (CFC) "in lieu" of an administrative appeal, 41 U.S.C. 7104(a) and (b); see 25 U.S.C. 450m-1(d), with further review of the resulting decision in the Federal Circuit, 28 U.S.C. 1295(a)(3); 41 U.S.C. 7107(a)(1). ISDA provides tribal contractors with a third path to review the contracting officer's decision. ISDA vests federal district courts with jurisdiction (concurrent with the CFC) over civil actions arising under ISDA contracts, 25 U.S.C. 450m-1(a), with review of the resulting decision in the appropriate regional court of appeals, 28 U.S.C. 1291.

2. Petitioner (the Tribe) is a federally recognized Indian tribe. Pet. App. 21a. As relevant here, the Tribe contends that it should have been paid a greater amount for contract support costs in three years: 1996, 1997, and 1998. *Id.* at 8a. The Tribe, however,

did not submit its claims to a contracting officer until September 2005, after the six-year limitations period for each claim had elapsed. *Ibid.* This case turns on whether the Tribe has established that its six-year period for filing its contract claims with a contracting officer under the CDA should be equitably tolled.

The underlying dispute about the proper amount of contract support costs owed under ISDA self-determination contracts arose from a disagreement that was based in significant part on an ISDA provision specifying that "the provision of funds under [ISDA] is subject to the availability of appropriations," 25 U.S.C. 450j-1(b). See Pet. App. 5a; see also *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 640-647 (2005). Because Congress's appropriations for contract support costs were insufficient to pay for all such costs incurred under ISDA contracts, see *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2187 (2012), the government read that provision to require only partial payment of such costs. See Pet. App. 5a. Many tribes, including for example the Cherokee Nation, pursued timely contract claims against the government for unpaid contract support costs. See *id.* at 5a-6a. The Tribe was not one of them.

In *Cherokee Nation* v. *United States*, No. 99-cv-92 (E.D. Okla.), the Cherokee Nation and another tribe filed suit in 1999 and moved to certify a class of "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under [ISDA] contracts * * * that were not fully paid their contract support costs needs" from 1988 to 2000. *Cherokee Nation* v. *United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001). The district court denied class certification in February 2001, *id.* at 366, and the case proceeded only on

the claims of the named plaintiffs. In March 2005, this Court held in *Cherokee Nation* that the government was liable to pay the amount of contract support costs specified in its ISDA contracts with the plaintiff tribes for fiscal years 1994 through 1997. 543 U.S. at 634, 636.

In September 2005, six months after this Court's *Cherokee Nation* decision, the Tribe submitted its own CDA claim to a contracting officer seeking unpaid contract support costs from 1995 through 2004. Pet. App. 8a. The contracting officer, as relevant here, denied the claims from 1996 to 1998 as untimely. *Ibid.*

3. a. The Tribe sought judicial review of the contracting officer's decision in the District Court for the District of Columbia, arguing that the CDA's limitations period should have been tolled. The district court initially dismissed on the ground that the limitations period was jurisdictional and did not permit tolling. Pet. App. 70a-71a & n.2.

The D.C. Circuit reversed in part and remanded. Pet. App. 44a-68a. The court of appeals concluded that the CDA's six-year period for filing a claim with a contracting officer is not jurisdictional, *id.* at 49a-55a, and did not completely preclude either class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), or equitable tolling, see Pet. App. 55a-65a. The D.C. Circuit, however, rejected the Tribe's contention that it was entitled to class-action tolling during the period in which the class-certification motion in *Cherokee Nation* was pending. *Id.* at 55a-62a. The court held that class-action tolling is not available to "asserted class members" who, like the Tribe, are "ineligible to participate in the class action at the time class certification is denied" due to

their failure to file an administrative CDA claim satisfying the CDA's "exhaustion requirement." *Id.* at 57a-58a. The Tribe does not challenge that holding here. The court of appeals remanded the case to the district court to resolve the Tribe's contention that the six-year period for filing a claim should be equitably tolled. *Id.* at 65a.

b. The district court entered summary judgment for the government on the Tribe's 1996-1998 contract-support-cost claims based on its holding that equitable tolling was unwarranted. Pet. App. 28a-37a. The court explained that "a litigant must establish two things for equitable tolling to apply: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *Id.* at 28a (quoting *Holland* v. *Florida*, 560 U.S. 631, 649 (2010)). The Tribe, the court observed, admitted that it was "aware that it only had six years to file a claim, but assumed that the deadline would be tolled based upon *Cherokee Nation*." *Id.* at 33a (citing the declaration of the Tribe's Health Department Administrator, *id.* at 100a ¶ 8). The court determined that the factors that the Tribe identified to justify its failure to file a timely claim "do not, individually or collectively, amount to 'an extraordinary circumstance'" that could warrant tolling. *Id.* at 34a. Although "filing an administrative claim is a relatively simple process," the court explained, the Tribe "cannot point to any affirmative act it took in over six years to pursue its claim diligently"; the government engaged in "no affirmative misconduct" that could warrant tolling; and the Tribe proffered no facts to support its tolling request beyond those already found "insufficient to support class action tolling." *Id.* at 37a.

After the district court dismissed an outstanding claim on which the parties were nearing settlement,[2] the Tribe appealed the district court's final judgment. At the Tribe's request, the D.C. Circuit held the appeal in abeyance pending the Federal Circuit's resolution of a similar equitable-tolling contention by another tribal entity in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012) (*ASNA*). 9/28/2012 Order.

c. In *ASNA*, a tribal organization (ASNA) that had entered into an ISDA self-determination contract to operate a hospital in Alaska waited (like the Tribe here) until September 2005 to file its claims for unpaid contract support costs for 1996, 1997, and 1998. See 699 F.3d at 1290, 1293. The Federal Circuit had earlier held, like the D.C. Circuit here, that class-action tolling was unavailable in *ASNA*. See *ASNA* v. *Sebelius*, 583 F.3d 785, 791-797 (2009), cert. denied, 561 U.S. 1026, and 562 U.S. 835 (2010). In the subsequent *ASNA* appeal for which the appeal in this case was held in abeyance, however, a divided panel of the Federal Circuit concluded that equitable tolling of the six-year CDA limitations period was warranted based on facts materially similar to those here. 699 F.3d at 1295-1298.

The *ASNA* majority reasoned that its equitable tolling decision turned on two "critical questions":

---

[2] The district court dismissed petitioner's remaining claim without prejudice and ordered that the dismissal would become a dismissal with prejudice 45 days later unless the parties moved to reopen the case with the Court's approval in that period. 5/1/2012 Order (Doc. 55). After 45 days elapsed and the remaining claim was dismissed with prejudice, however, the district court did not enter its judgment as a separate document. See Fed. R. Civ. P. 58(a). Petitioner's appeal was filed less than 60 days after the dismissal with prejudice of its last remaining claim in this action.

(1) "whether ASNA pursued its rights diligently even though it did not present" its contract claims for unpaid contract support costs within the six-year limitations period, and (2) "whether [ASNA's] reliance on the then-existing legal landscape in deciding not to present [its claims] constituted an 'extraordinary circumstance' sufficient to warrant equitable tolling." 699 F.3d at 1296. The court concluded that "ASNA pursued its rights by monitoring the legal landscape and taking action as appropriate," *id.* at 1298, because (1) ASNA (like the Tribe here) had been a member of a class action certified in 1993 in *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999), that sought reimbursement for certain unpaid "indirect costs" under ISDA contracts with the Department of the Interior, *id.* at 1094; (2) the district court in *Ramah Navajo* had rejected the government's contention that class membership must be limited to tribes that had presented their CDA claims to a contracting officer; (3) ASNA (like the Tribe here) obtained funds from the government's partial settlement of the *Ramah Navajo* class claims. *ASNA*, 699 F.3d at 1291, 1296-1297. The Federal Circuit determined on that basis that ASNA "took reasonable, diligent, and appropriate action" when it later concluded that, rather than file its own CDA claim with a contracting officer, it would remain as a potential class member of a different putative class action filed by the Pueblo of Zuni seeking to recover contract support costs under contracts with the Department of Health and Human Services from 1993 onward. *Ibid.* (citation omitted).

The *ASNA* majority characterized those events as "unique facts and extraordinary circumstances" and held that they warranted equitable tolling. Pet. App.

1298.[3] In so holding, the majority expressly "decline[d] to follow the reasoning recently employed by [the] district court" in this case. *Id.* at 1296 n.4.

Judge Bryson dissented. *ASNA*, 699 F.3d at 1298-1301. He concluded that ASNA had not exercised reasonable diligence in pursuing its rights. *Id.* at 1298-1299. Judge Bryson further concluded that "the majority [failed to] point[] to any facts that would suffice to meet th[e] exacting standard" in *Holland*'s "second prong," which requires that the party seeking equitable tolling show that "'some extraordinary circumstance stood in his way and prevented timely filing.'" *Id.* at 1300 (quoting *Holland*, 560 U.S. at 649).

d. After the Federal Circuit issued its decision in *ASNA*, the D.C. Circuit in this case affirmed the district court's denial of equitable tolling. Pet. App. 1a-19a. The court of appeals explained that "[e]quitable tolling is available to a party 'only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing.'" *Id.* at 10a (quoting *Holland*, 560 U.S. at 649). The court held that the Tribe failed to establish any such "extraordinary circumstance" warranting tolling. *Id.* at 2a.

---

[3] The majority acknowledged, however, that in 2002, the district court in *Ramah Navajo* had entered an order noting that the government would resist class certification on at least one of the new claims filed in that case, that "decertification of both claims is a possibility," and that "a number of decisions have been announced . . . which are harmful to the Class's claims." 699 F.3d at 1291 n.2 (brackets omitted) (quoting *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303, 1308 (D.N.M. 2002).

The court of appeals explained that, "[t]o count as sufficiently 'extraordinary' to support equitable tolling, the circumstances that caused a litigant's delay must have been beyond its control," Pet. App. 10a, and "cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation," *id.* at 11a. Here, the "Tribe faced no extraordinary circumstances," the court reasoned, "because the obstacles the Tribe confronted were ultimately of its own making." *Id.* at 12a. The Tribe was not "prevented by external obstacles from timely filing" and, instead, it "delay[ed] pursuing its claims" because of its own "inadequate responses to relatively routine legal events." *Ibid.*

The court of appeals addressed and rejected the Tribe's three arguments for equitable tolling. Pet. App. 2a, 12a-19a. "[T]he legal misunderstandings and tactical mistakes the Tribe has identified," the court concluded, "do not amount to 'extraordinary circumstance[s]' justifying equitable tolling." *Id.* at 2a (brackets in original).

First, the court of appeals rejected the Tribe's reliance on its (mistaken) expectation that it would "be a member of the *Cherokee Nation* class" because it was previously a member of the earlier certified class action in *Ramah Navajo* that the government had partially settled. Pet. App. 13a; see *id.* at 6a. "The flaw in the Tribe's calculations was that it was not eligible to participate in the *Cherokee Nation* class," and its apparent "belief that it could participate in the *Cherokee Nation* class without exhausting its administrative remedies was unjustified." *Id.* at 13a-14a. That "miscalculation," the court explained, was not an

extraordinary circumstance beyond the Tribe's control. *Id.* at 14a.

Second, the court of appeals rejected the Tribe's contention that its failure to file a timely CDA claim for unpaid contract support costs should be excused because the government had taken the position that such costs were not properly payable such that "the certainty of failure * * * stood in [the Tribe's] way." Pet. App. 15a. The court reasoned that "[a] party is not excused from timely filing its claim because the agency's view of the law might be inhospitable." *Ibid.* "The federal courts, not contracting officers, are the final word on federal law," and it was therefore "incumbent upon [the Tribe] to test [its] right and remedy in the available forums." *Id.* at 15a-16a (citation omitted). Moreover, given that the "procedure for exhausting administrative remedies is simple," the court added, "[w]hat stood between the Tribe and class-action tolling [as a putative class member in *Cherokee Nation*] was little more than an envelope and a stamp." *Id.* at 17a.

Finally, the court of appeals rejected the Tribe's contention that the combination of factors that it faced was an "extraordinary circumstance" warranting tolling, explaining that "none of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims." Pet. App. 18a.

The court of appeals thus stated that it "agreed with the dissent in [*ASNA*] that equitable tolling was unwarranted there, as it is here, for want of an 'extraordinary circumstance' under *Holland*," and that, as Judge Bryson explained in his *ASNA* dissent, "the [*ASNA*] majority failed to identify any obstacle that stood in the Tribe's way to prevent timely filing of its

claims." Pet. App. 15a n.5. Because the court held that the Tribe failed to identify any "extraordinary circumstance[]" that prevented it from timely filing a claim, and therefore had not satisfied the second prong of the two-part test for equitable tolling, the court did not pass upon whether the Tribe had satisfied the first prong by diligently pursuing its rights. *Id.* at 12a n.4.

DISCUSSION

The court of appeals correctly held that neither the Tribe's erroneous prediction of the outcome of litigation, nor its expectation that the government would deny its administrative claims, warrants equitable tolling of the CDA's six-year limitations period. That decision, however, squarely conflicts with the Federal Circuit's decision in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012), which found tolling appropriate on materially similar facts. In the government's view, certiorari is warranted.

The Federal Circuit's decision effectively sets the nationwide rule for equitable tolling under the CDA because the normal routes to review of a contracting officer's decision under the CDA end in the Federal Circuit. See p. 3 *supra*. Although ISDA permits tribal contractors to appeal the denial of their CDA claims under ISDA contracts to district courts outside the Federal Circuit's supervision (*ibid.*), tribes retain the option to follow the normal CDA routes to the Federal Circuit. In addition, the Federal Circuit's willingness to apply equitable tolling in this context in the absence of any showing that extraordinary circumstances prevented a tribal contractor from timely filing its CDA claim has confounded the government's efforts to achieve an orderly resolution of outstanding

claims for unpaid ISDA contract support costs in the wake of this Court's decisions in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), and *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012). This Court's review is therefore warranted.

1. The court of appeals correctly held that the Tribe is not entitled to equitable tolling of its six-year period for submitting a contract claim to a contracting officer. Such tolling is appropriate "only if" the litigant seeking tolling shows that it had been pursuing its rights diligently but that "'some extraordinary circumstance stood in [its] way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). As the court of appeals held, no such "extraordinary circumstance" stood in the Tribe's way and "prevented [its] timely filing." The Tribe appears to have simply miscalculated its deadline because it mistakenly believed that it could obtain class-action tolling during the pendency of the class-certification motion in *Cherokee Nation*. See Pet. App. 100a ¶ 8.

a. This Court has made clear that "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418. A litigant seeking such equitable relief must therefore establish its own diligence, because "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam); see *Pace*, 544 U.S. at 419 ("Under long-established principles, petitioner's lack of diligence precludes equity's operation."). But diligence alone is

insufficient. Courts properly exercise their authority to extend equitable relief quite "sparingly," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), and, for that reason, "the circumstances of a case must be 'extraordinary' before equitable tolling can be applied." *Holland*, 560 U.S. at 652. A litigant must accordingly show, in addition to its own diligence, that "'some extraordinary circumstance stood in [its] way' and prevented timely filing'" before it can secure tolling. *Id.* at 649 (quoting *Pace*, 544 U.S. at 418).

Equitable tolling can be appropriate where a party's efforts to obtain relief have been "thwarted by forces wholly beyond [its] control." *Holland*, 560 U.S. at 660 (Alito, J., concurring in part and concurring in the judgment); see *Wallace* v. *Kato*, 549 U.S. 384, 400-401 (2007) (Breyer, J., dissenting) (explaining that courts have applied equitable tolling where "a 'plaintiff because of disability, irremediable lack of information, or other *circumstances beyond his control* just cannot reasonably be expected to sue in time'") (emphasis added; citation omitted). "[A] party's infancy or mental disability, absence of the defendant from the jurisdiction, [or] fraudulent concealment" may thus warrant tolling in certain cases. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 n.17 (2014). By contrast, a "'garden variety claim of excusable neglect'" or a "miscalculation" in litigation has never been a basis for equitable tolling. *Holland*, 560 U.S. at 651 (quoting *Irwin*, 498 U.S. at 96); see *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

The Tribe's claim falls squarely in the latter category. The Tribe does not contend that it made active efforts to preserve its rights during the statutory period but was somehow prevented from doing so by forces beyond its control. Rather, the Tribe explains that it "did not file individual claims" because it "assumed" that it could benefit from the *Cherokee Nation* litigation as it did from the earlier *Ramah Navajo* class action that the government had partially settled. Pet. App. 100a ¶ 7 (declaration of the Tribe's Health Department Administrator). When the district court in *Cherokee Nation* denied class certification in 2001, "the Tribe considered whether to file individual claims," but it still decided against doing so because it "ha[d] limited resources" to expend on litigation; "the case law was not clear on whether tribal contract support cost claims were valid"; the Tribe "assumed" that "the contracting officer would deny" their claims if the Tribe filed them; and the Tribe believed that it had "a little more time" because the *Cherokee Nation* class action would trigger class-action tolling. *Id.* ¶ 8. The Tribe therefore simply decided to do nothing and just "wait[] to see what the Supreme Court would do." *Ibid.* As the court of appeals concluded, such "[d]elays caused by a party's [own] inauspicious legal judgments are not 'extraordinary circumstances' sufficient to justify equitable tolling." *Id.* at 19a (brackets omitted).

b. Although the Tribe contends (Pet. 18-23) that the court of appeals erred in requiring that it identify some "external obstacle" that prevented its timely filing, that requirement is reflected in the canonical formulation of the "extraordinary circumstance" test, which requires that "'some extraordinary circum-

stance stood in [the litigant's] way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). That formulation would make little sense if equitable tolling were designed to apply to circumstances in which a competent litigant stands in its *own* way and prevents timely filing. Such self-inflicted wounds are not properly remedied at equity.

There is also no merit to the Tribe's argument (Pet. 15-17) that the D.C. Circuit erred because it declined to address "whether the Tribe exercised reasonable diligence," Pet. 15. Although the Tribe asserts that "[t]he two prongs of the *Holland* test" are not distinct factors "to be applied separately," *ibid.*, this Court has made clear that a litigant seeking equitable tolling must "establish[] [the] two elements" of that test, *Pace*, 544 U.S. at 418. This Court has thus rejected equitable-tolling claims—like the court of appeals did here—where the litigant failed to demonstrate one of the two components of the standard without addressing whether the litigant satisfied the other component. See, *e.g.*, *Lawrence*, 549 U.S. at 336-337 (rejecting equitable tolling without addressing diligence because the habeas petitioner fell "far short of showing 'extraordinary circumstances'"); *Pace*, 544 U.S. at 418 (noting without resolving the litigant's argument that he had "satisfied the extraordinary circumstance test," and holding that, "[e]ven if [the Court] were to accept [the argument], he would not be entitled to relief because he has not established the requisite diligence").

c. The Federal Circuit's equitable-tolling holding in *ASNA* based on facts materially similar to those here does not survive scrutiny. The Federal Circuit found "extraordinary circumstances" warranting

tolling (699 F.3d at 1298) where ASNA "[m]onitor[ed]" and (in the Federal Circuit's view) "reasonably interpret[ed] applicable legal proceedings" in the "class action context," *id.* at 1297. Like the Tribe here, ASNA argued that it could reasonably rely on the fact that it was a class member in the earlier *Ramah Navajo* case, in which the district court certified a nationwide class of all tribes having ISDA contracts with the Department of the Interior, including those that had failed to submit a CDA claim to a contracting officer. *Id.* at 1291. That district court ruling, the Federal Circuit concluded, was the only "on-point authority" at the time that "specifically addressed the exhaustion of remedies issue" and, in the Federal Circuit's view, the Tribe therefore acted reasonably by relying on *Ramah Navajo* and failing to submit its own claim to a contracting officer. *Id.* at 1297. But it is settled that a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or *even upon the same judge in a different case.*" *Camreta* v. *Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (emphasis added; citation omitted). A litigant that chooses to rely on such non-precedential district court rulings does so at its own hazard. Such reliance on a prior (incorrect) district court decision is simply a type of "miscalculation" that is "not sufficient to warrant equitable tolling." See *Lawrence*, 549 U.S. at 336-337. Thus, as the court of appeals held, the Tribe's own "legal misunderstandings and tactical mistakes" are not "extraordinary circumstances" that might support tolling because they are not obstacles beyond the Tribe's control that "prevented" a timely filing. Pet. App. 2a (brackets omitted).

2. Although the D.C. Circuit correctly held that the Tribe failed to identify any "extraordinary circumstance" that prevented a timely filing and that might support equitable tolling, the government agrees with the Tribe that certiorari is warranted to resolve the conflict of authority between the decision in this case and the Federal Circuit's decision in *ASNA*. Not only does the Federal Circuit's *ASNA* decision threaten to expand significantly the scope of equitable tolling in CDA actions against the government over which the Federal Circuit exercises appellate jurisdiction, the question presented has great practical importance for the government's efforts to achieve an orderly resolution of a significant number of outstanding tribal claims for contract support costs in the wake of this Court's decisions in *Cherokee Nation*, 543 U.S. 631, and, more recently, in *Ramah Navajo*, 132 S. Ct. 2181.

Cherokee Nation (2005) and *Ramah Navajo* (2012) together establish that the government must pay the full amount of contract support costs incurred by a tribal contractor under the ISDA, including for years in which Congress capped the appropriations available to pay those costs at a sum insufficient to pay all contractors. See *Ramah Navajo*, 132 S. Ct. at 2186 ("ISDA mandates that the Secretary shall pay the full amount of 'contract support costs' incurred by tribes in performing their contracts."). Because Congress's underfunding of ISDA contract support costs began in the early 1990s, see *id.* at 2186-2187, the Department of Health and Human Service's Indian Health Service (IHS) has informed this Office that thousands of historical claims from hundreds of tribal contractors must now be brought to an orderly resolution.

Many tribal contractors filed timely claims under the CDA for their unpaid contract support costs. The government has now either paid those claims or is working with the contractors to determine the proper amounts that may be owed. Many other tribal contractors, however, failed to file claims for payment under the CDA until after this Court in *Cherokee Nation* (and, for some, after *Ramah Navajo*) rejected the government's primary substantive defenses to tribal contract-support-cost claims. What is most immediately at stake in the division of authority between the D.C. and Federal Circuits is whether tribal contractors could then submit numerous older claims for otherwise time-barred contract payments.

Under the governing statutory scheme, it is the Federal Circuit's erroneous decision that will dictate the nationwide rule absent review by this Court. The CDA gives government contractors like the tribal contractors at issue here the option to obtain review of the denial of their contract claims in proceedings leading to the Federal Circuit. See p. 3, *supra*. Although ISDA also provides tribal contractors an alternative route of review that avoids the Federal Circuit's appellate jurisdiction (see *ibid.*), it is highly unlikely that contractors with untimely claims will choose to pursue that route in light of the Federal Circuit's broad understanding of equitable tolling in *ASNA* and the D.C. Circuit's contrary determination in this case. Indeed, the IHS has informed this Office that it has been unable to resolve some untimely claims with tribal contractors that have emphasized that the Federal Circuit's rationale for allowing equitable tolling in *ASNA* is not meaningfully case-specific.

The uncertainty created by the Federal Circuit's erroneous decision in *ASNA*—and the increasing volume of untimely claims inspired by it—have confounded the government's attempts to achieve orderly resolution of the ongoing litigation over tribal contract support costs. Although the D.C. Circuit correctly rejected the Tribe's arguments here, the resulting division of authority has exacerbated the uncertainty that the government and tribal contractors face. This Court's review is warranted to resolve that conflict, as well as to ensure that the proper equitable tolling framework is applied to CDA claims generally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ROBERT E. KIRSCHMAN, JR.
DONALD E. KINNER
Attorneys

MAY 2015